SOME LESSONS FOR CIVILIAN JUSTICE TO BE LEARNED FROM MILITARY JUSTICE.[1]

I. The prime object of military organization is Victory, not Justice. The Army's object is to kill, disable, or capture our enemy before he can kill or capture us. In that death-struggle which is ever impending, the Army, which defends the Nation, is strained by the terrific consciousness that the Nation's life and its own is every moment at stake. No other objective than Victory can have first place in its thoughts; there is never any remission of that strain. If the Army *can* do Justice to its men, well and good. But Justice is always secondary; and Victory is always primary.

This cardinal truth will explain why it is not always feasible to do exact Justice in the Army, in the midst of war.

II. But I am not here to defend military justice. It is civilian justice that is upon the defensive. It has been on the defensive for a generation past. It has done very little in that generation to take up that defensive. It is doing very little now.

This Bar Association, and every Bar Association, has a prime duty to improve civilian justice.

Civilian justice will have to remain on the defensive until it can show that it is at least as efficient in its machinery as military justice. When civilian justice shall have adopted all the efficient measures now already possessed by military justice, and capable of equal use by civilian justice, then and not till then can it start a counter-offensive.

III. The military system can say this for itself: It *knows what it wants;* and it systematically *goes in and gets it.*

Civilian criminal justice does not even know what it wants; much less does it resolutely go in and get anything.

Militray justice wants *discipline*—that is, action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of masses of men. The

1. An address delivered before the Maryland Bar Association on June 28, 1919, by John Henry Wigmore, formerly Colonel, Judge Advocate, U. S. A.

court-martial system supplies the sanction of this discipline. It takes on the features of Justice because it must naturally perform the process of inquiring, in a particular case, what was the regulation or order, and whether it was in fact obeyed. But its object is discipline.

The civilian penal system, on the other hand, has not even formulated what it wants. Some still say Retribution to the individual; some say Prevention of other wrongdoers; some say not Retribution, but Reformation of the individual; and most ignore a fundamental element, viz., the public re-affirmation of the community's principles of right and wrong.

Nor does the civilian system resolutely go about any one of these purposes. It maintains a substantive law which is a hodge-podge of inadequate and illogical definitions. It maintains a procedure which has not been revised for a century. It maintains a prosecuting personnel which is in large proportion crude and untrained and narrow-minded, and a defense personnel which is usually skilled only in evading the law. It maintains a judiciary personnel which seldom studies its large problems and which seldom understands more than the elementary features of its duty. It maintains a police which, in the rural regions, is often the match of Dogberry the ancient watchman, and in the city regions is frequently undermined by politics and petty intrigue. And it organizes all this personnel in a shiftless manner which would break down the efficiency of the ordinary business house in thirty days.

IV. Military justice is a theme of many aspects. My remarks today will be limited to pointing out five features in which civilian criminal justice may take a lesson from military justice —features in which military justice has already arrived at methods to which civilian justice has scarcely begun to aspire.

1. *Centralized supervision of all criminal courts within the State.* The fundamental shortcoming of civilian criminal justice is that the several courts are virtually independent of each other. The Supreme Court, to be sure, is supposed to interpret the uniform static rule of law as established by the Legislature. But it stops there. We have forgotten that the efficiency of any

penal system is largely dependent on the *current administration* of that law. And there is no provision in our system for administration. For example, in New York City there are some forty magistrates, each of whom is virtually the final arbiter in most cases coming before him. They rotate in turn among the different districts. But there is no central control giving a common policy, and they remain even ignorant each of what the other does or what policies he is following. A recent statistical inquiry shows the inefficiency of this (Journal of Criminal Law and Criminology, X, 90, May, 1919). A single illustration will suffice, viz.: the sentence. Of the 17,000 cases of *intoxication,* it appeared that the percentage *discharged,* by the several magistrates, ranged between 2 per cent and 79 per cent. Of those *convicted,* the disposition of the man by suspended sentence ranged between 1 per cent and 83 per cent; the disposition of fine ranged between 6 per cent and 80 per cent. On the charges of *disorderly conduct,* the discharges ranged between 18 per cent and 54 per cent. On the charges of *vagrancy,* the discharges ranged between 5 per cent and 79 per cent. On convictions of disorderly conduct, the suspension of sentence ranged between 2 per cent and 50 per cent. On conviction of *peddling without a license,* the fines ranged between 20 per cent and 100 per cent. All of this represented a single community and the same set of judges sitting in the same courts. Such a helter-skelter treatment of a problem demanding consistent and known policies spells complete inefficiency, and is unworthy of an enlightened community seeking to repress crime.

The same features would be found throughout all the administrative stages of penal justice—arrest, bail, defense, and the rest. We possess a vast aggregation of administrative officials, with no inspection, no supervision, no central control—not even knowledge of what the others are doing.

What we need here is to adopt the Federal military system. Every division and department is to be sure an independent command, in military justice, as in other matters. But a record of every general court-martial is kept, and under U. S. Rev. St., § 1199, it is forwarded to the Judge Advocate General at Washington for revision. There the records are scrutinized, not only for

errors of law, but for deviations from sound policy. The J. A. G. notifies the entire body of division commanders of policies desirable to follow, and notifies individual commanders of specific errors or deviations. For example, the regular army tradition called for a sentence of penitentiary and discharge for any offense in the nature of larceny. But the J. A. G. recommended, when our new army was forming, that caution be here exercised, and that for men capable of reclamation a lighter sentence be imposed, and a confinement only in the probationary barracks, pending restoration to duty, if possible. Thousands were saved to the Army in this way. The best policy was made known by the central superintendent to all commanders, and a common administrative attitude became possible.

So, also, procedural errors of frequent occurrence were noted, and circular letters were sent out calling attention to their frequency and warning against their recurrence. In this manner, the average court-martial was improved, and greater efficiency attained.

Such a central supervision is the one feature most needed for state criminal justice. Its lack is one of the most obvious glaring defects.

What we need is a *chief judicial superintendent* in every state. We need such an official for civil justice also. But we need him most in criminal justice. And the example is already here awaiting us, in Federal military justice. We have no excuse for failing to avail ourselves of that example.

2. *Verbatim record of trial.* The foregoing measure is futile unless a verbatim stenographic report is preserved of each trial. This practice exists, in military justice, for all general courts-martial, and has made possible the method of central supervision. In common fairness, also, such a report should be made at the expense of the state. The practice is not yet universal, in civilian justice; usually, only enough is transcribed to explain the legal exceptions. For administrative supervising purposes a complete record should be preserved and forwarded.

3. *Automatic appellate scrutiny for every accused's case.* In spite of the several specific safeguards on which we place such

high value—right to witnesses, right to counsel, right to jury, right to remain silent, and so on—the one vital measure which insures the constant observance of all these is still lacking in our law, viz., the automatic appellate scrutiny of *every* criminal case by a higher court.

We are accustomed to think of these things from the point of view only of an accused's rights; from that point of view he is entitled to the protection of appellate scrutiny. But is even more important from the administrative point of view. An effective central supervision of criminal justice is impossible without complete data showing the central authority what is being done daily in our trial courts. *Every* record should go up for appellate scrutiny.

In Federal military justice every record of every case goes up to at least one higher authority; and all records of general courts-martial go up two stages, to the Judge Advocate General, or the President. Every convicted man thus obtains an appellate scrutiny; and this he obtains without any cost, paying no counsel fee and no transcription expense.

This is an ideal of which civilian justice has been dreaming ever since Magna Carta. Complete justice to the poor man is still a dream in our civilian courts. In the military courts, it is already a fact. And it costs not a cent. It does not even need a motion in court. It is automatic.

Here is an object lesson for civilian justice.

4. *Minimum indeterminate sentence.* The whimsicalities and inequities of sentences have long been a glaring defect of our civilian justice. One reason for this fault is that there is always a conflict between the principle of publicly rebuking the crime itself with an adequate penalty, and that of allowing for the offender's extenuating circumstances. A severe sentence may be needful to deter others, but may be needless for the individual offender. There is only one way to reconcile these principles, viz., impose a deterrent sentence of maximum period, and leave the minimum entirely unfixed, so as to permit individual treatment. E. g., impose for a burglary a sentence of not more than ten years, and then after the man has been studied in prison, extend clemency and release him, if proper, at any early

period deemed suitable. This also enables the case to be adequately considered after a fuller examination of the man's personality and history than is possible at the time of trial.

The minimum indeterminate sentence already exists in the Federal military justice. A section of the J. A. G. O., known as the Clemency section, passes upon all applications for clemency, examining both the record of the trial and the report of the prison superintendent. The law authorizes the Secretary of War to direct the release of any prisoner at any time. Thus the administration of the sentence after conviction is flexible, and is centralized in the same hands as the trial itself.

Only two states yet possess the genuine minimum indeterminate sentence, i. e., a law which permits the release of the convicted person at any time that is deemed fit, prior to the maximum period. Moreover, the parole and sentence laws that do permit reduction of time are administered by all sorts of disjointed boards, which constitute rival authorities and have no direct connection with the courts, the original organs of criminal justice. The only way to secure efficient administration of the minimum indeterminate sentence is to bring it under control of the central supervising officer.

Federal military justice does this. The machinery is next to perfect. How deplorably imperfect are the state systems can be seen by perusing, in the Journal of Criminal Law and Criminology, the reports from 1913 to 1916 of the Committee on Indeterminate Sentence and Parole.

5. *Psychiatric examination of the accused.* Modern science is unanimous that mental defects are responsible for a large share of crime. E. g., of 100 paroled prisoners who violated their parole, a prison record showed that 35 had been classed as mental defectives. Modern science agrees that every court should have attached to it a medical officer who will report upon the accused's mental condition, and that the sentence and treatment of the accused should be determined in the light of this report. There are perhaps 2,000 criminal courts sitting daily in the U. S.; no more than 20 of these have a regular psychiatric examiner attached to them. In the City of Baltimore you have recently given the medical man a status in one of your courts.

In the Federal military justice, the probationary barracks at Fort Leavenworth have for eight years past had the best kind of psychiatric advice. At our entrance to the war, the Secretary of War sanctioned a plan to assign psychiatric officers to every division for examination of accused men before trial. Owing to the lack of sufficient qualified officers, and to other obstacles, this was not immediately done. But after some time it was achieved in many, if not most, cantonments; and now the records on appeal usually contain a report by the psychiatric officer as a matter of course.

Here the Federal military system has rapidly accepted a measure which still remains unadopted by any State in the Union.

This measure brings us back to the necessity of a centrally directed administration. The psychiatric staff must be organized from State headquarters, because in the rural courts there are not enough criminal cases to require the entire continuous service of one officer, and the staff must therefore go on circuit when and where needed. It remains for the State civilian justice to take this step.

6. *Conclusion.* And so, throughout, we come back to the prime fact, viz., that the most needed measure for State criminal justice today is centralized supervision under a chief judicial superintendent; that this measure not only itself brings vast improvement in efficiency, but that it alone will enable other measure to work well; that the Federal military justice already possesses this and several other features well worth imitation; and that civilian justice is put on the defensive to take a lesson in becoming efficient by adopting these features.